

IN THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges Owens, P.J., and Fitzgerald and Schuette, JJ.

GEORGE H. GOLDSTONE,
Plaintiff-Appellant,

v

BLOOMFIELD TOWNSHIP
PUBLIC LIBRARY,
Defendant-Appellee.

Supreme Court No. 130150

Court of Appeals No. 262831

Oakland County Circuit Court
No. 04-060611-CZ

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BRIEF OF AMICI CURIAE TOM DOWNS AND MILTON E. HIGGS

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STATEMENT OF INTEREST OF AMICI CURIAE

The Amici filing this brief consist of Tom Downs and Milton E. Higgs, both of whom were delegates to the 1961-1962 Michigan Constitutional Convention. The Amici share a commitment to ensuring that the Michigan Constitution is correctly interpreted to reflect the understanding of the people of Michigan at the time of its ratification.

Amici are also concerned that an incorrect interpretation of Const 1963, art 8, § 9, would lead to diminished access by Michigan residents to public libraries. As delegates to the Convention, they shared the common understanding that public libraries are one of the primary means of ensuring an educated populace, which in turn is necessary for a flourishing democracy.

The questions presented in this appeal and addressed in the proposed Brief Amici Curiae are of major jurisprudential significance to the State of Michigan and of particular interest to Amici given their role in drafting the Constitution. Amici recognize their obligation to assist the Court in this case.

JURISDICTIONAL STATEMENT

On November 8, 2005, the Michigan Court of Appeals issued *Goldstone v Bloomfield Twp Pub Library*, 268 Mich App 642; 708 NW2d 740 (2005). On December 19, 2005, Plaintiff-Appellant filed a timely application for leave to appeal. On April 17, 2006, this Court issued an order directing the parties to file supplemental briefs and stating that persons interested in the determination of the issue of whether Defendant-Appellee's policy violates Const 1963, art 8, § 9, may move the Court for permission to file briefs amicus curiae. This Court has jurisdiction to review this case by appeal, or to take other action. MCR 7.301(A)(2); *Id.* 7.302(G)(1).

STATEMENT OF QUESTION PRESENTED

Does Defendant-Appellee's policy violate Const 1963, art 8, § 9?

- Plaintiff-Appellant answers: Yes
- Defendant-Appellee answers: No
- Oakland County Circuit Court answered: No
- Court of Appeals answered: No
- Amici Curiae Tom Downs and Milton E. Higgs answer: Yes

STANDARD OF REVIEW

This Court reviews issues of constitutional interpretation de novo. *County of Wayne v Hathcock*, 471 Mich 445, 455; 684 NW2d 765, 772 (2004). This Court also reviews issues of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21, 24 (1991).

STATEMENT OF FACTS

Amici Tom Downs and Milton E. Higgs adopt the facts set forth in the trial court's Summary Disposition Opinion and Order, and the facts in the Court of Appeals' Opinion.

INTRODUCTION

This case presents the Court with another opportunity to reaffirm its commitment to an originalist jurisprudence. At the same time, this case offers the Court the chance to ensure that the constitutional mandate of broad public access to public libraries is effected.

Amici were members of the Michigan Constitutional Convention that drafted the 1963 Michigan Constitution. They argue below that the text and original meaning of Const 1963, art 8, § 9 (hereinafter “Section 9”),¹ requires this Court to reverse the Court of Appeals’ decision and rule that Appellee’s policy of excluding nonresidents² from its services violates the Michigan Constitution.

First, the text of Section 9 establishes the right of all Michigan residents to borrow books³ from all Michigan public libraries, subject, of course, to reasonable regulations. A Michigan public library is not “available” to “all residents of the state” if the vast majority of Michigan residents—those outside of a library’s service area—are unable to borrow books. Similarly, library “regulations” may not eliminate the availability of a library by prohibiting nonresident book borrowing. Lastly, all Michigan public libraries, regardless of when they were established, are subject to Section 9’s availability requirement because all Michigan public libraries are either “establish[ed]” or “support[ed]” by the Legislature.

Second, the history, drafting, ratification, and subsequent practice under Section 9 show that Michigan residents have the constitutional right to borrow books from all Michigan public

¹ The Appellee labels Section 9 “obscure” in an effort to discredit Appellant’s constitutional claim. (Applee. Br. 1.) Amici take the position that every provision of the Constitution, regardless of its notoriety, is binding in Michigan because it represents the people’s will. See *County of Wayne v Hathcock*, 471 Mich 445, 468; 684 NW2d 765, 779 (2004) (“[T]he primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.”).

² The term “nonresident” in this Brief refers to Michigan residents who are outside of a library’s legal or contractual service area, unless indicated otherwise by context.

³ Following the lead of the Court of Appeals, this Brief will use the phrase “borrow books” (and similar phrases) to “encompass those library services provided to residents, but not to nonresidents.” *Goldstone v Bloomfield Twp Pub Library*, 268 Mich App 642, 646 n.1; 708 NW2d 740, 743 n.1 (2006).

libraries. Michigan has a long commitment to spreading knowledge to its residents, and a primary means of doing so has been widespread access to public libraries. Debates in the 1961-1962 Michigan Constitutional Convention clearly reveal that the delegates understood Section 9 to further Michigan's historical goal through a mandatory, self-executing constitutional command requiring libraries to permit nonresident book borrowing. At the same time, the delegates recognized that an unlimited right to borrow books by nonresidents could financially harm libraries or the integrity of the libraries' book collections, so they included language to preserve their fiscal integrity and the integrity of their book collections, not to eliminate the right of nonresidents to borrow books. Actions by the Legislature and Executive under Section 9 confirm Amici's interpretation and hence the right of nonresidents to borrow books.

The history, text, context, subsequent practice under Section 9, and common sense further establish that Section 9 applies to all Michigan public libraries regardless of when they were established. These same considerations also show that Section 9's availability mandate does not require legislative action: that it is self-executing. Lastly, by upholding the constitutionally mandated access to public libraries, this Court will encourage broader access to public libraries through other means, such as library-municipality contracts for library services.

Amici's interpretation of Section 9 best accounts the text, history, original meaning, governmental practice, and goals of Michigan. This is unlike the interpretations offered by Appellee or the Court of Appeals who had to strain the text and original meaning to fit their pre-ordained views.

ARGUMENT

I. THE TEXT OF CONST 1963, ART 8, § 9, ESTABLISHES THE RIGHT OF NONRESIDENTS TO BORROW BOOKS

A. The Original Meaning of the Constitution's Text is Authoritative

The proper role of this Court is to interpret and apply Section 9. *Alliance for the Mentally Ill of Mich v Michigan*, 461 Mich 935, 935; 603 NW2d 248, 249 (1999) (Markman, J., concurring). This Court respects the separation of powers by interpreting the Constitution according to its “original meaning,” which is the meaning understood by the People of Michigan when they ratified the Constitution. *County of Wayne v Hathcock*, 471 Mich 445, 468; 684 NW2d 765, 779 (2004).

To ascertain the original meaning of Section 9, this Court will look first, to the text of Section 9 itself. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174, 179 (2004). To aid in its understanding of Section 9's original meaning, this Court will review the historical background behind and purpose of Section 9, *People v DeJonge*, 442 Mich 266, 274; 501 NW2d 127, 132 (1993), contemporaneous evidence of the original meaning from sources such as the debates in the Ratification Convention and the *Address to the People*, *People v Nutt*, 469 Mich 565, 573-74; 677 NW2d 1, 6 (2004), and contemporaneous governmental practice under Section 9. *See Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 75; 630 NW2d 297, 302 (2001) (Young, J., concurring) (describing the search for original meaning as the “search for contextual clues about what meaning the people who ratified the text *in 1963* gave to it”).

B. Michigan Public Libraries Must be Available to All Michigan Residents

The plain meaning of Section 9's availability requirement establishes that Michigan public libraries must lend books to all Michigan residents, including those that reside outside of the library's service area.

The key term, "available," means "capable of use for the accomplishment of a purpose." *Webster's Third New International Dictionary, Unabridged Edition* (1967), p 150. There is no limitation apparent or inherent in the term. There is certainly no distinction in the term's meaning, regarding the extent of availability, between different classes of "use[rs]" such as residents and nonresidents, or between different classes of "purpose[s]" such as book borrowing and all other library services, like the Appellee finds. (Applee. Suppl. Br. 2.) Understood in its plain meaning, therefore, "available" includes book borrowing by nonresidents.

Appellee asserts that available "could mean a more limited form of access," one which does not include borrowing privileges. (Applee. Br. 8.) This defies common sense. What "available" means is determined by reference to the object of availability. In Section 9, the object is libraries. The paradigmatic aspect of patron use of libraries is borrowing books. Patrons *on occasion* go to a library to read a book or use the internet or some other service, but the primary reason for patronizing a library is book borrowing. Libraries themselves recognize this centrality of book borrowing. That is why all libraries have relatively elaborate procedures surrounding book borrowing, including the ubiquitous library card. Also, library reading rooms would be inadequate to meet the needs of library patrons if patrons could only read books on the premises, showing that library buildings themselves are designed on the presumption of book borrowing.

Appellee's actions show that it too recognizes that book borrowing is central to a library patron's experience. Otherwise, why would Appellee spend the massive amounts of time and

money litigating this case? Appellee recognizes that book borrowing privileges are the key leverage it has over neighboring municipalities: book borrowing is what city residents such as Appellant care about and are willing to pay for, not “listening stations” or the “Internet.”

Appellee’s argument that a library is constitutionally available without its central object of book borrowing would be absurd in other areas of life. Imagine the Appellee’s argument as applied to a gas station: the gas station remains available in a “more limited form of access,” (*id.* 8), even though it does not dispense gas. Patrons can still use the gas station to purchase soft drinks, snacks, and other items; they can also use the bathroom. The gas station “offers a multitude of onsite services that do not involve [dispensing gas].” (*Id.*) Appellee’s argument permits it to cut out the central purpose of public libraries and still label a library “available.”

Indeed, Appellee obliquely concedes that “available” in Section 9 includes nonresident book borrowing. Appellee first agrees that the language, “an open door policy to the residents of the state,” from MCL 397.555(d), is equivalent to “compl[iance] with art 8, §9.” (Applee. Suppl. Br. 10.) *See also* (*id.* 11 (“compliance with the ‘open door policy’ of art 8, §9”).) Then, Appellee makes explicit that an “open door policy” prohibits a public library from discriminating against nonresidents. Appellee does so through admitting that it violated section 397.555(d)’s “open door policy” by “refusing to service nonresidents.” (*Id.* 11.) *See also* (*id.* 12 (connecting “an ‘open door’ policy” to “lend[ing] its books to nonresidents”).) Consequently, both parties recognize that “available,” in Section 9, means that a Michigan public library must make its services, including book borrowing, available to nonresidents.

The term “available” also appears elsewhere in the Constitution, and in all but one instance, its context indicates that available meant accessible to the target class, usually the general public. Const 1963, art 4, § 6; *Id.* art 4, § 17; *Id.* art 9, § 35; *Id.* art 9, § 35a. *Cf. id.* art 9,

§ 6 (stating that “property taxes at the highest rate available . . . may be imposed”). Article 4, § 6, for example, in its discussion of reapportionment, states that within thirty days of the federal census becoming “available,” the Secretary of State shall convene a commission on legislative apportionment. Here, “available” meant accessible to the general public. Likewise, Section 9’s use of “available” means that public libraries must be accessible to all Michigan residents, including those who reside outside of a library’s service area.

C. Michigan Public Libraries Must be Available to *All* Michigan Residents

Appellee’s argument also fails because it conflicts with Section 9’s emphatic statement that public libraries serve *all* Michigan residents. There is no distinction in classes of Michigan residents, as Appellee’s argument would require, between residents and nonresidents (*i.e.*, those outside of a library’s service area). The term “all” modifies the scope of “residents.” The thing which must be available, “public libraries,” must be available to “all” classes of Michigan residents, without distinction.

“All” also appears in Section 9’s second sentence. Appellee’s interpretation of “all” in Section 9’s first sentence would lead to absurd results in its second sentence. Instead of literally “[a]ll” penal fines being used to support public libraries, Appellee’s interpretation would permit distinctions regarding the fines. This result is implausible because the use of “[a]ll” in the second sentence signifies all of a particular thing: penal fines. Likewise, “all residents” signifies all residents, without distinction.

D. Michigan Public Libraries May Reasonably Regulate, But Not Eliminate, Nonresident Book Borrowing

Consistent with the plain meaning of “available,” explained above, the meaning of “regulations” in Section 9 permits libraries to limit, but not eliminate nonresident book borrowing. Both the Court of Appeals, *Goldstone v Bloomfield Twp Pub Library*, 268 Mich App

642, 647; 708 NW2d 740, 744 (2006), and Appellee, (Applee. Suppl. Br. 3-4), rely heavily on Section 9's grant of authority to public libraries to adopt "regulations" to argue that public libraries may entirely *exclude* nonresidents from services. This reading of "regulations," however, does not fit with the plain meaning of "regulation[]," and it would also eviscerate Section 9's availability requirement.

A rule adopted by a public library is not a "regulation[]" of an available service if it entirely eliminates that service. A regulation sets the "time, amount, degree, or rate of" the regulated service. *Webster's Third New International Dictionary, supra* at 1913. Hence, public libraries may, for example, limit the hours their services are available, the number of books a patron may borrow, and impose a fee for borrowing privileges. They may not, however, simply label a refusal to provide services a "regulation[]." A true regulation continues the regulated activity, it does not prohibit it.

Amici's interpretation of "regulation[]" is consistent with Section 9's availability requirement. Section 9 mandates that all Michigan public libraries be "available to all residents of the state." Const 1963, art 8, § 9. The Appellee's broad reading of "regulation[]," by contrast, directly conflicts with Section 9's availability requirement. When interpreting the Constitution, care must be taken because "every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *In re Lapeer County Clerk*, 469 Mich 146, 156; 665 NW2d 452, 457-58 (2003). Appellee's expansive reading of regulation, which permits public libraries to eliminate the availability of library services to nonresidents, makes those services unavailable thereby "nullify[ing]" part of Section 9.

Appellee's capacious interpretation of Section 9's term, "regulations," and its corresponding diminution of Section 9's availability requirement, also conflicts with usage of

available elsewhere in the Constitution. For example, Const 1963, art 4, § 17, states that “[s]uch vote [of legislative committees] shall be available for public inspection.” It was assumed that public access to voting records was subject to reasonable regulations by the legislative bodies,⁴ but those bodies could not, consistent with section 17’s availability requirement, completely prohibit—through so-called regulations—entire cross-sections of the state from accessing the voting records. If the legislative bodies could entirely prohibit access to the voting records through regulation, the purpose of the availability requirement in the first place would be thwarted. Similarly here, if Appellee and other public libraries are permitted, under the guise of regulations, to deny nonresidents access to services, then Section 9’s availability requirement would be a dead letter.

Appellee has misread the scope of “regulation[]” for another reason: there is no limit to its interpretation. Appellee argues that Section 9 “leave[s] the control of the library’s books to the local governing boards.” (Applee. Suppl. Br. 4.) With this argument Appellee, and below the Court of Appeals, sought to limit the scope of Section 9’s availability requirement. *Goldstone, supra* at 647.

Neither the Appellee nor the Court of Appeals offered any limiting principle to their argument. Public libraries, under their interpretation, can eliminate *all* services—not only book borrowing—to nonresidents without infringing on Section 9’s availability requirement. This would make Section 9’s availability requirement a sham and dramatically alter the meaning of “regulation[].”

E. All Michigan Public Libraries Are Subject to Section 9’s Availability Requirement

Section 9’s availability clause applies to all Michigan public libraries, regardless of when the libraries were established. The phrase, “which shall be available to all residents of the state,”

⁴ For example, rules regulating the hours such information would be available.

modifies “public libraries” which were or are, either established or supported by the Legislature. Const 1963, art 8, § 9. Therefore, any libraries that were or are, either established or supported by the Legislature, are subject to Section 9’s availability requirement.

All Michigan public libraries were or are, either “establish[ed]” or “support[ed]” by the Legislature, including the Appellee. (Applee. Suppl. Br. 11 (stating that “BTPL . . . receives state aid”).) Consequently, all Michigan public libraries, including Appellee, are subject to Section 9’s availability requirement.

Appellee argues that application of Section 9’s availability requirement would be impermissibly “retroactive” because its text is prospective. (*Id.* 5-7.) Appellee relies on the language “shall provide” to support its contention. (*Id.* 6.) However, “shall provide” modifies only the Legislature’s duties of “establish[ing] and support[ing],” and does not apply to “which shall be available.” *If* any portion of Section 9 is exclusively prospective, then, it is only its first clause and not the availability clause.

Appellee’s argument fails for a third reason. It leads to the absurd result that the Legislature is not obligated to “support” many of Michigan’s public libraries. Assuming that Section 9’s first clause (establish or support) applies only to libraries created after 1964, then the Legislature’s obligation to “support” Michigan public libraries also applies only to post-1964 libraries. Indeed, the Legislature could cease to fund Appellee.⁵

II. THE ORIGINAL MEANING OF CONST 1963, ART 8, § 9, SHOWS THAT IT ESTABLISHES THE RIGHT OF NONRESIDENTS TO BORROW BOOKS

A. The Original Meaning of the Constitution’s Text is Authoritative

As noted in Part I.A, the original meaning of Section 9 is authoritative. *Hathcock, supra* at 468. Below, Amici will establish that the original meaning of Section 9 shows that Michigan

⁵ In Part IV below, Amici explain why the plain meaning of Section 9 is contrary to Appellee’s argument that the Legislature must execute Section 9.

public libraries must provide book borrowing services to nonresidents. To do so, Amici will review: the broader historical context behind Section 9; Section 9's immediate ratification context; its purpose; and governmental actions taken pursuant to it.

B. The History of Michigan's Commitment to an Educated Populace Shows that Const 1963, art 8, § 9, Establishes the Right of Nonresidents to Borrow Books

Prior to and since statehood, Michigan has sought to promote an educated citizenry through universal access to public libraries. "The importance of libraries as repositories of cultural heritage and as sources of information has been recognized since the earliest days in Michigan." Dunbar & May, *Michigan: A History of the Wolverine State* (Michigan: William B. Eerdmans Publishing Co, 3rd, 1995), p 605.

Michigan's commitment to broad access to public libraries began prior to statehood and is rooted in the Northwest Ordinance. There, the Second Continental Congress stated that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." An Ordinance for the government of the territory of the United States northwest of the river Ohio, art. III, *found at* 1 USC Northwest Ordinance; *see also* 1 Official Record, Constitutional Convention 1961, p 830 (Delegate Bledsoe) ("I cannot disassociate the means of education from libraries."). One of the "means of education" used by Michigan settlers from the very beginning was libraries. Dunbar & May, *supra* at 199, 605-06; Farmer, *History of Detroit and Wayne County and Early Michigan* (Michigan: Silas Farmer & Co, 3rd, 1890), p 710, 759-62. Even prior to Michigan becoming a state, residents organized private lending libraries. *Farmer, supra* at 710.

In its first constitution, Michigan expanded its commitment to broad access to public libraries by providing for at least one library in every township. Const 1835, art 10, § 4. The 1835 Constitution also supported this commitment financially by providing that all penal fines

and military exemption payments should go to supporting the libraries. *Id.* The 1850 and 1908 constitutions reaffirmed Michigan’s commitment to creating as many libraries as possible by mandating at least one public library in each township or city. Const 1850, art 13, § 12; Const 1908, art 11, § 14; *see also* City, Village and Township Libraries Act, 1877 PA 164, MCL 397.201 *et seq.* (giving authority to local governments to establish public libraries).

Unfortunately, despite these efforts, through the early twentieth century many “rural areas and small towns remained . . . with no library service.” *Dunbar & May, supra* at 606. The Legislature passed a number of acts prior to the 1963 Constitution trying to remedy this lack of access to public libraries. *See, e.g.,* County Libraries Act, 1917 PA 138, MCL 397.301 *et seq.*; Regional Libraries Act, 1931 PA 250, MCL 397.151 *et seq.*; Public Libraries Act, 1952 PA 52, MCL 397.471 *et seq.*

When the convention delegates met in 1961, they worked against a background where the State was strongly committed to broad access to public libraries, but where the State had been unable—despite increasing efforts by the Legislature—to achieve its goal. The delegates were aware of Michigan’s historic commitment to broad access to public libraries and the State’s previous failed attempts to make that access a reality because Delegate Andrus, a member of the Committee on Education, explained it to the delegates.⁶ *Official Record, supra* at 823-24. Against this setting it is clear that the delegates who drafted and ratified what became Section 9 did so to overcome prior failures and achieve the goal of broad access to public libraries for all

⁶ Appellee argues that “the delegates had no intention of changing a system and statutory scheme that had worked admirably for over 50 years.” (Applee. Br. 19.) It is difficult to square Appellee’s assertion with the delegates’ statements, *see Official Record, supra* at 822 (Delegate Bentley) (“This has never been adhered to as a matter of practice.”); *id.* at 830 (Delegate Bentley) (“[W]e saw no reason to continue a constitutional provision which has not been enforced in any respect.”), much less the very fact that Proposal 31 significantly altered the 1908 Constitution’s language.

Michigan citizens. *See* Const 1963, art 8, § 9 (“which shall be available to all residents of the state”).

C. The Delegates to the 1961-1962 Michigan Constitutional Convention Understood that Const 1963, art 8, § 9, Establishes the Right of Nonresidents to Borrow Books

1. The Committee on Education’s Proposal 31 added language, “which shall be available to all residents of the state,” to make existing public libraries available to all Michigan residents

The Committee on Education offered Proposal 31 to amend Const 1908, art 11, § 14, by adding “which shall be available to all residents of the state.” *Official Record, supra* at 822. The Committee recognized that the purpose of the new language was to “continue[] the fine Michigan tradition of encouragement and support of public libraries.” *Id.* The Committee acknowledged that the previous method of ensuring broad access to public libraries—mandating creation of at least one library in each township—had failed because “only one out of 15 townships has a library.” *Id.*

The Committee reported to the Convention delegates that it believed the new availability language of Proposal 31 would overcome previous obstacles by ensuring that “‘public’ libraries will be ‘available’ to residents without fixing how or where the libraries themselves shall be organized.” *Id.* The Committee remained dedicated to broad access to public libraries, but it proposed a new means of achieving that access: requiring existing public libraries, regardless of location, to “be available to all residents of the state.”⁷ *Id.*

The delegates in the Committee of the Whole recognized that Proposal 31’s availability requirement proposed a new way to achieve the State’s longstanding goal. Delegate Brown stated that the Subcommittee on Education found that “as a practical matter you are not having

⁷ To further the goal of broad access to public libraries the Committee further proposed that the Legislature also “support” public libraries through continued appropriations of funds. *Official Record, supra* at 822 (Delegate Bentley).

today a library in every township” so the new language “will extend library services so that they will be available throughout the state.” *Id.* at 831.

2. The delegates’ debate shows that they intended to preserve public libraries’ financial integrity and the integrity of their book collections, not to enable libraries to refuse services to nonresidents

The Committee on Education understood (and explained to the other delegates its understanding) that Section 9’s availability requirement was subject to “reasonable rules for the use and control of its books.” *Id.* at 822 (Delegate Bentley). Despite this understanding, some of the delegates in the Committee of the Whole were concerned that the constitutional right of access would cause financial hardship to libraries or threaten their ability to control their collections.

Delegate Leibrand offered an amendment to strike the new language of Proposal 31 (“which shall be available to all residents of the state”) because he thought it would “place an undue burden upon existing libraries.” *Id.* at 834. He repeatedly expressed his concern that Proposal 31’s availability requirement would mandate “free” library services to “all residents of the state.” *See id.* (stating “shall be available free,” “free library service,” and “free library service”). Delegate Leibrand’s fear was premised on two assumptions: (1) Proposal 31’s availability requirement mandated that public libraries permit nonresidents to use all their services; and (2) that public libraries could not charge reasonable fees for nonresident use of such services.

The delegates from the Committee on Education *accepted* Delegate Leibrand’s first assumption and *rejected* his second. No delegate argued that Delegate Leibrand was incorrectly reading Proposal 31’s availability requirement to permit nonresidents to use library services. In fact, they affirmed his understanding. Delegate Bentley stated that the “committee believed that this provision [“which shall be available to all residents of the state”] should be in this respect as

broad and general in scope as possible.” *Id.* at 835. Later, Delegate Bentley reaffirmed that Section 9 would require Michigan’s public libraries to provide services to nonresidents—including book borrowing—when he explained that the governing bodies of local public libraries would “pass reasonable regulations” for “cases where the applicant for a book or a periodical was not an immediate resident of the locality.” *Id.* at 2561.

Instead, the delegates explained to Delegate Leibrand that the Committee believed that a library would be able to “make reasonable rules for the use and control of its books,” as Delegate Bentley noted. *Id.* at 835; *see also id.* (Delegate Bentley) (reiterating the Committee’s understanding that Proposal 31 permitted libraries to make “reasonable rules”). The Committee had discussed the potential problem raised by Delegate Leibrand and concluded that Proposal 31’s availability requirement did not require *free* usage by nonresidents. *Id.* at 835 (Delegate Andrus). In fact, Delegate Hanna made a joke about public libraries being able to charge nonresidents a reasonable borrowing fee when he said, “now they want to charge us poor folks from the country to come in and use their library in addition. (laughter).” *Id.* Even in this jest, however, Delegate Hanna’s assumptions were that Proposal 31’s availability requirement opened Michigan’s public libraries to nonresidents, and that it permitted libraries to charge a reasonable fee.

An exchange between Delegates Higgs and Bentley highlights the scope of Section 9’s availability clause and the role of library regulation. Delegate Higgs questioned the Committee on Education whether “someone from some other part of the state” could use a public library while “on vacation.” *Id.* at 836. His reading of the availability clause was that he “d[i]dn’t see how we could possibly deny the availability of any books to any resident of the state of Michigan.” *Id.* Delegate Bentley first clarified that public libraries would continue to regulate

the “use and control” of their books. *Id.* But, subject to that condition, Delegate Bentley affirmed that a nonresident “can have that library and its services and its books.” *Id.* Delegates Higgs and Bentley agreed that Section 9 required public libraries to provide services to nonresidents, their only point of contention was whether libraries could regulate the provision of such services.

The concern animating many delegates was also, in addition to financial hardships placed on libraries, the perceived threat to the ability of libraries to control their collections. Delegate Higgs, for example, questioned whether “you could limit or qualify that [availability] in any way by the requirement of a deposit for the use of the book . . . or anything else.” *Id.* Delegate Higgs worried that nonresidents could, because of the broad availability requirement, demand books at unreasonable hours, or refuse reasonable demands regarding security and control of the library’s collection. *See also id.* (Delegate Dehnke) (“Somebody might want to come in at an odd hour of the night.”). Delegate Bentley, in response, reiterated the Committee on Education’s understanding of Proposal 31 that libraries could promulgate reasonable rules “for use in the control of their books.” *Id.* The premise of both Delegates Higgs and Bentley’s statements was that Proposal 31’s availability clause required public libraries to provide services to all Michigan residents.

No delegate suggested that the authority of libraries to enact reasonable regulations to control their collections permitted them to *prohibit* book borrowing and other services to nonresidents. Consequently, although Amici agree with Appellee that “the drafters intended to leave the control of the library’s books to the local governing boards,” (Applee. Suppl. Br. 4), there is no evidence that this grant of authority to libraries permitted them to refuse services to the very class of person (nonresidents) Section 9 was meant to enfranchise. The Committee on

Education’s responses to questions regarding the scope of Section 9’s availability clause all pointed to ensuring the fiscal integrity of the libraries and the ability of the libraries to maintain the integrity of their collections.

No responses hinted at the possibility that libraries could simply refuse services to nonresidents. If that had been an option—if refusal of services to nonresidents had been a permissible interpretation of Proposal 31’s availability requirement—then it would have been the quick and easy answer to delegate questions that a reasonable person such as Delegate Bentley, in the circumstances, would have given. But that option was not available because that interpretation was not plausible, so Delegate Bentley had to explain how the availability requirement interacted with libraries’ reasonable regulatory authority.

Appellee agrees with much of Amici’s rendition of the debates. For example, Appellee recognizes that the delegates expressed concern over a potentially overly-broad reading of Section 9’s availability clause. (*Id.* 3.) Unfortunately, Appellee then jumps to the unwarranted conclusion that the amendment proposed by Delegate Dehnke (“under reasonable regulations”) eviscerated the availability requirement and permitted public libraries to prohibit book borrowing by nonresidents. (*Id.* 3-4.) Instead, as a review of the Convention debates makes clear, the Dehnke amendment was simply understood as a way to codify and thereby make explicit the consensus reached by the delegates on the interaction between Proposal 31’s availability clause and the libraries’ regulatory authority.⁸

Delegate Dehnke’s amendment was introduced to “clear up much of the controversy we have been having for the last several moments.” *Official Record, supra* at 836 (Chairman

⁸ The Committee on Style and Drafting’s deletion of “reasonable,” and addition of “adopted by the governing bodies thereof,” did not change the scope of permissible restrictions. *Official Record, supra* at 2561 (Delegates Bentley and Gadola). Contrary to Appellee’s bald assertion, (Applee. Br. 23), the delegates did not eliminate “reasonable” to authorize libraries to make *unreasonable* regulations.

Powell). Delegate Dehnke understood his amendment to address the concerns of Delegates Higgs and Leibrand regarding preserving libraries' fiscal and collection integrity. *Id.* (Delegate Dehnke). Delegate Dehnke saw his amendment as giving "the library board the authority to lay down some regulations to set up the hours during which the library shall be considered open and all that sort of thing." *Id.*

The Dehnke amendment in no way "supports the Court of Appeals decision that the board of BTPL was within its rights to restrict the privilege of borrowing books to residents." (Applee. Suppl. Br. 4.) Instead, as the delegates who rose in response to the amendment recognized, it dealt with the delegates' articulated fiscal and collection integrity concerns. *See, e.g., Official Record, supra* at 836 (Delegate Kuhn) (arguing that the Committee on Education intended the availability requirement to permit libraries to prohibit, for example, book borrowing at odd hours). These concerns did not elicit the response that libraries could out-and-out prohibit nonresident services such as book borrowing, but instead established that Section 9 enabled libraries to regulate for the purposes of fiscal and collection integrity. Again, the Appellee's interpretation of the Convention debates simply lacks support.

Given the delegates concern with the fiscal and collection integrity of public libraries, they had no reason to interpret Proposal 31 to permit public libraries to prohibit services to nonresidents. Both of the delegates' goals—broad library access to nonresidents and strong public libraries—could be met by the less drastic measure of giving libraries the ability to create reasonable regulations. They could, for example, charge a reasonable borrowing fee to protect fiscal integrity and make nonresidents return borrowed books within a reasonable period of time to ensure collection integrity. And this course is exactly the one charted by the delegates and

proposed by Delegate Dehnke. Not the extreme methods the Court of Appeals and Appellee assert they adopted.

Permitting Michigan's public libraries to refuse services, including book borrowing, to nonresidents would undercut the stated reason for Proposal 31 in the first place. Amici described above how the Committee on Education wanted to achieve the State's goal of wide access to public libraries, but through the new method of making the library services of existing public libraries available to nonresidents. As Delegate Bentley explained, "as long as a person from any part of the state can come up to your library and conform with your local regulations and rules, he can have that library and its services and its books made available to him." *Id.* at 836. The new method embodied in Proposal 31's availability clause hinged on existing libraries offering services to nonresidents. Therefore, the Court of Appeals and Appellee's interpretation is not true to Section 9's original meaning because it would thwart its primary innovation.

Appellee concludes, after an extremely short review of the Convention debates, that "none of the delegates expressed a personal intention that every state library issue borrowing privileges to all state residents." (Applee. Br. 13.) Appellee is wrong. Delegate Andrus, in response to Delegate Leibbrand's concerns that Proposal 31 required free "circulation of books" to "a tourist or traveling salesman," *Official Record, supra* at 834, stated that libraries could contract with surrounding municipalities so "the people there may have library cards" or "charge . . . to the individuals who will use it."⁹ *Id.* at 835.

⁹ The response by Delegate Andrus exemplifies the delegates' understanding that Proposal 31 permitted charging a reasonable nonresident borrowing fee. In response to Delegate Leibbrand's concern that Proposal 31's availability requirement would cause financial hardship to public libraries, Delegate Andrus reassured him that libraries would remain financially sound. She stated that Proposal 31 simply increased the means by which Michigan residents would have access to libraries, so libraries could continue to contract with surrounding communities for their services "or they can charge . . . to the individuals who will use it." *Official Record, supra* at 835. Delegate Leibbrand understood Delegate Andrus' interpretation of Section 9's availability requirement in this way because he responded by noting that, "under the language of the constitution, a library could refuse to provide service to a

It is difficult to avoid characterizing much of Appellee's argument as attacking a straw person. Appellee and the Court of Appeals repeatedly mischaracterize Appellant's (and hence Amici's) position as seeking "free access." (Applee. Br. 7, 10, 11, 12, 13.); *Goldstone, supra* at 647; *see also* (Mich. Library Ass'n Br. 2, 10.). For example, Appellee asserts that Appellant's interpretation of Section 9 "would eliminate a library's control over the circulation of its books and its ability to raise revenue." (Applee. Br. 1.); *see also* (*id.* 7 (characterizing Appellant as seeking "free access").); (*Id.* 10 (same).); (*Id.* 13 (characterizing Appellant as seeking "unfettered" access).) That is not Amici and Appellant's position. As Amici have established above, the original meaning of Section 9 permits libraries to create regulations to protect their financial integrity and the integrity of their collections. No one is arguing that Section 9 requires free or unfettered access.

Appellee's strategic reason for mischaracterizing Appellant's position is easy to understand. By beating a straw person, Appellee can claim that its interpretation is more reasonable. For instance, Appellee attacks a straw person when it claims that there was "no suggestion that nonresidents would have an *unlimited* right to borrow books." (*Id.* 11 (emphasis added).) And then, after defeating the straw person, it declares victory: "To the contrary, it was presumed that the governing boards of the libraries could regulate the borrowing of their materials." (*Id.*) Since Appellant and Amici agree that nonresidents do not have an "unlimited right" to borrow books, they also agree that libraries can regulate their collections to preserve their fiscal and collection integrity. Appellee's "victory" is therefore irrelevant to this case.

Finally, Amici's interpretation of Section 9 is supported by a later exchange made regarding the Committee on Style and Drafting's amendment to Section 9. The Committee

resident of the state of Michigan if he didn't pay." *Id.* To make the point even more clear, Delegate Andrus stated bluntly: "it [Proposal 31] doesn't say free." *Id.*

omitted the word “reasonable” and added “adopted by the governing bodies thereof.” Delegate Bentley sought confirmation that the change had not altered the substance of Section 9. In particular, he asked whether Section 9 continued to permit “local governing bodies” to pass “reasonable regulations” to govern accessibility to “residents of the state”: “particularly . . . in cases where the applicant for a book or a periodical was not an immediate resident of the locality.” *Official Record, supra* at 2561. As in the earlier debates, discussed above, since Delegate Bentley stated that Section 9’s availability requirement would require libraries to service nonresidents, his only remaining question was the ability of local libraries to protect the integrity of their finances and their collections. A member of the Committee on Style and Drafting confirmed Delegate Bentley’s reading of the amendment. *Id.*

3. The delegates understood Const 1963, art 8, § 9, to use multiple means to increase access to public libraries

The Convention delegates understood Section 9 to overcome the 1908 Constitution’s failures by using multiple means to increase access to public libraries. The Committee on Education explained Proposal 31 as using multiple means to open up existing libraries. *Id.* 822. This included different forms of funding for library usage by nonresidents: “It would be done . . . by the surrounding communities paying a certain amount to your library, and all could use it, or they can charge . . . to the individuals who will use it.” *Id.* at 835 (Delegate Andrus). The delegates found that Proposal 31 was consistent with many avenues of broad library access: state library services, regional libraries and other cooperative arrangements, legislative action, and bookmobiles. *Id.* (Delegate Follo); *Id.* (Delegate Bentley).

Of course, one of the means of encouraging broader access to public libraries was continued legislative action. This is clear from Proposal 31’s language (“legislature shall provide by law for the establishment and support of public libraries”), the Committee on

Education's statements, *see id.* at 822 (“[t]he word ‘support’ has been included because there is a growing need for statewide support for public libraries”), and from statements by the delegates themselves. *See, e.g., id.* at 823 (Delegate Bentley) (explaining that the addition of “support” “implies a continuing responsibility on the part of the legislature”). However, since legislative action was simply one of the means chosen by the delegates to effect the State’s goal—because alone it had not been sufficient in the past—Appellee’s argument that Section 9 “*requires* legislative action” fails. (Applee. Suppl. Br. 8 (emphasis added).)

4. The delegates understood that Section 9’s mandate of greater public access was self-executing

The delegates to the Constitutional Convention did not intend, as Appellee argues, to leave greater public access to legislative discretion. (*Id.*) First, consider the oddity of Proposal 31’s language—“which shall be available to all residents of the state”—under Appellee’s interpretation. This language is imperative, not discretionary. Section 9 commands that Michigan’s public libraries “shall be available” to nonresidents. It does not counsel availability or suggest availability if and how the Legislature desires it.

Second, as explained above, the delegates to the Convention understood Proposal 31’s availability requirement to mandate state-wide access to Michigan residents, but the delegates envisioned a multi-pronged approach, only one of which was legislative action. Contrary to Appellee’s claim, (*Id.* 1), when directly faced with the question of whether Proposal 31’s availability requirement left the modes of implementation up to the Legislature, *Official Record*, *supra* at 835 (Delegate Higgs), the chairman of the Committee on Education affirmed what others had previously said: public libraries would be available through multiple means. “[T]he committee,” stated Delegate Bentley, “felt that a broad, general statement of encouraging the extension of library services throughout the state to all its residents, *through various media*,” was

appropriate in Section 9. *Id.* (Delegate Bentley) (emphasis added). In the delegates' eyes, legislative action was simply one way to reach the State's goal of wide access to public libraries.

Third, the delegates' statements in the Convention show that they interpreted Section 9's availability requirement to be self-executing. For instance, in the exchange between Delegates Higgs and Bentley, discussed in Part II.C.2, there was no hint that the increased availability brought about by Section 9 would be the result of legislative action. *Id.* at 836. Instead, Delegate Higgs recognized, and Delegate Bentley confirmed, that Section 9's availability clause would, of its own accord, require libraries to provide services to nonresidents. The self-executing nature of Section 9 was one of Delegate Higgs' premises in posing his questions to the Committee on Education. Without that premise, Higgs' could not have asked the hypothetical about a vacationer in Bay City seeking access to its library services.

Fourth, the delegates repeatedly noted that the Legislature would continue its role in helping establish, and build on its prior actions of supporting, libraries. The Committee on Education's report stated that the addition of "support" in Section 9 continued the prior legislative practice of funding public libraries "on a regular basis." *Id.* at 822. In other words, the delegates envisioned the Legislature continuing what it had been doing. The delegates did not tie the Legislature's duties under Section 9 to the availability requirement imposed on public libraries, which is located later in Section 9's text.

D. Governmental Actions Taken Pursuant to Const 1963, art 8, § 9, Show that it Establishes the Right of Nonresidents to Borrow Books

Both the legislative and executive branches have taken actions pursuant to Section 9 that support Amici's and contradict Appellee's interpretation of it. While the interpretations of the Constitution by co-equal branches of the State government are not binding on this Court, they lend weight to Amici's position by showing that other governmental officers, acting pursuant to

their oaths to support the Michigan Constitution, have determined that Section 9 does require public libraries to make their services available to nonresidents. Const 1963, art 11, § 1; *see also School Dist of Traverse City v. Attorney General*, 384 Mich 390, 407 n.2; 185 NW2d 9, 17 n.2 (1971) (“Although an opinion of the Attorney General is not a binding interpretation of law which courts must follow, it does command the allegiance of state agencies.”).

1. Legislation after the adoption of Const 1963, art 8, § 9, supports Amici’s interpretation

The Legislature has promoted broad access to public libraries through numerous initiatives and financial support. For example, it almost immediately enacted the Distribution of Penal Fines to Public Libraries Act, 1964 PA 59, MCL 397.31 *et seq.*, which provided for service contracts and the allocation of penal fines. In the following year, the Legislature enacted the State Aid to Public Libraries Act, 1965 PA 286, which provided funding for public libraries.¹⁰ The Legislature’s actions bolster Amici’s interpretation of Section 9 under which the Legislature’s role is to create the background legal norms and the cooperative structures, along with the necessary funding, to help libraries become as fully available as possible.

Contrary to Appellee’s contention, Amici’s interpretation of Section 9 does give effect to “each and every term of the text.” (Applee. Suppl. Br. 9.) Appellee charges that Appellant’s (and hence Amici’s) interpretation of Section 9 fails to take into account the Legislature’s duties to “establish[]” and “support.” *Id.* As shown by legislation enacted immediately after adoption of the 1963 Constitution, however, and consistent with the understanding of the delegates’ themselves, the Legislature has a vitally important role to play in broadening access to public libraries. The Legislature took up this role immediately upon ratification of the 1964 Constitution.

¹⁰ In 1977, the Legislature repealed the 1965 Act and enacted the State Aid to Public Libraries Act, 1977 PA 89, MCL 397.551 *et seq.*, which, in addition to funding public libraries, also created cooperative libraries.

Indeed, what is odd about Appellee's argument is that it paints the Legislature in a bad light, implying that the Legislature was derelict in its duty for approximately thirteen years. Appellee argues that the "Legislature [] adopted legislation to implement art 8, §9" when it created Cooperative Libraries that "did not exist prior to 1977." (*Id.* 9-13.); *see also* (*id.* 13 ("The plain meaning of art 8, §9 is that the Legislature was to create a new library system . . . as opposed to existing libraries.")).)

According to Appellee, then, the Legislature did not fulfill its duty for thirteen years during which time Section 9's availability requirement sat idle. If the Appellee's interpretation of Section 9 was correct, then the Legislature has been woefully tardy in meeting its obligations. Amici's interpretation of Section 9, by contrast, shows the Legislature fulfilling its constitutional obligations, while ensuring that the availability clause is not read out of the Constitution.

Furthermore, under Appellee's interpretation of Section 9, the concern of the delegates, expressed in their debates over the scope of the availability clause, was severely misguided. Instead of worrying about whether public library financial and collection integrity would be harmed because public libraries were going to be required to serve nonresidents, they should have focused their concerns on whether the legislature would live up to its constitutional commitment to availability.

Under Appellee's interpretation of Section 9, the delegates were mistaken in a second way: the delegates, following the lead of the Committee on Education, sought to change the means of achieving broad access to public libraries from one where the Legislature was required to establish a public library in each township, to one where the existing public libraries were made available to nonresidents. Appellee's interpretation effectively reverses the delegates' single biggest innovation regarding public libraries by once again—like the prior State

constitutions—putting the onus of availability on the Legislature and its duty to “establish[]” libraries.

Amici’s interpretation, by contrast, avoids these pitfalls. It makes sense of the delegates’ discussions and accords the proper respect to their innovative attempt to use existing public libraries to serve all of Michigan’s residents.

In addition, as explained in Part I.B (and as Appellee’s own brief demonstrates), the Legislature has statutorily defined “available” to include nonresident book borrowing and other services. (Applee. Suppl. Br. 9-12.) In 1977 the Legislature passed the State Aid to Public Libraries Act. MCL 397.551 *et seq.* The Act provided for the establishment of cooperative libraries through the joint participation of existing local public libraries. *Id.* The Act imposed criteria for membership in a cooperative library including: “(d) Maintain an open door policy to the residents of the state, as provided by section 9 of Article VIII of the state constitution of 1963.” *Id.* 397.555(d); *see also* (Applee. Suppl. Br. 10 (“Therefore, by definition, a member of a cooperative library must comply with art 8, §9.”).) As an incentive to public libraries to join cooperatives, the Legislature authorized additional funding to member libraries.¹¹ MCL 397.566(3), (4).

Appellee implicitly admits that section 397.555(d)’s open door policy—which is coextensive with Section 9’s availability requirement—requires service to nonresidents. First, Appellee concedes that it does not “interpret” section 397.555(d) as requiring service to nonresidents. (Applee. Suppl. Br. 11.) Second, Appellee acknowledges that it “has already been sanctioned by the state” for its “refus[al to] service nonresidents” (*Id.*) Appellee therefore

¹¹ Appellee argues that loss of state aid “would not be necessary for a violation of §561 if all libraries were required by the Constitution to provide full service to nonresidents.” (Applee. Br. 21.); *see also* (*id.* 25.) Appellee misses the point. The Legislature incentivized cooperative membership through additional funding, MCL 397.566(3), (4), thereby making it even more attractive for libraries to fulfill their constitutional mandate of serving persons who would otherwise be —absent the cooperative agreement—nonresidents.

concedes that it failed to meet Section 9's availability requirement *because* it failed to meet section 397.555(d)'s open door policy *because* of its refusal to serve nonresidents.¹² (*Id.*) In sum, Appellee agrees with Amici that the Legislature has defined "available" to include serving nonresidents.

Additional evidence that the Legislature included providing services to nonresidents within the meaning of "open door policy" and hence of "available" is found in MCL 397.561a. There, the Legislature provided that a public library, which is a member of a cooperative, may "charge nonresident borrowing fees." MCL 397.561a. This provision is important for two reasons. First, it shows that the Legislature understood that the "open door policy" mandated by MCL 397.555(d) included within its scope nonresidents. Similar to the delegates in the Constitutional Convention, the Legislature wanted to ensure the fiscal integrity of libraries by permitting them to charge a reasonable fee¹³ for providing services to nonresidents.

Second, and equally as important, MCL 397.561a is the companion provision to MCL 397.561. Section 397.561 governed the relationship between cooperative library members and "residents of the cooperative library's area." *Id.* 397.561. Section 397.561 covered only that relationship and not the relationship between cooperative library members and nonresidents. Section 397.561a completes coverage of the Act by governing the relationship between cooperative library members and "person[s] residing outside of the library's service area." *Id.*

¹² But, Appellee argues, since "BTPL has already suffered the statutory penalty for its residency restrictions," this Court should leave enforcement of Section 9 to the Legislature or the Department of History, Arts or Libraries. (Applee. Suppl. Br. 11.)

¹³ Of course, a reasonable borrowing fee cannot be whatever the market will bear. (Applee. Br. 16.) The Legislature recognized this in section 397.561a when it limited nonresident borrowing fees to library costs, MCL 397.561a, the Attorney General recognized this, OAG, 1983-1984, No. 6188, p 203 ("fees imposed reasonably related to the costs"), and most importantly, the delegates recognized this. *See, e.g., Official Record, supra* at 2561 (Delegate Bentley) (confirming with the Committee on Style and Drafting that public libraries would be authorized "to pass reasonable regulations"); *Id.* (Delegate Gadola) ("[T]he interpretation that Delegate Bentley has given of it is correct."). The reason for this consensus is that a fee greater than a library's costs would constitute an unconstitutional tax. 1963 Const, art 9, §§ 1,2.

397.561a. The result was complete coverage by the Legislature.¹⁴ This dual-pronged approach shows that the Legislature was aware that nonresidents would borrow from member libraries under the “open door provision” of MCL 397.555(d), which in turn affirms that the Legislature understood that Section 9’s availability requirement included nonresidents.¹⁵

The legislative background to MCL 397.561a supports Amici’s contention. As discussed below, in 1980 the Attorney General issued an opinion in which he stated that “Const 1963, art 8, § 9 . . . entitles all residents of the state to the full use of the facilities of any public library within the state, subject to reasonable regulations.” OAG, 1979-1980, No. 5739, p 875. Then, in 1983, the Attorney General issued another opinion regarding Section 9. There, he concluded that Section 9 permitted libraries to “impos[e] borrowing privilege fees upon nonresident users who are not entitled to the services of said library pursuant to contract.” OAG, 1983-1984, No. 6188, p 203.

It is against this background, where the Attorney General had reiterated both that libraries must offers services to nonresidents and that they may charge reasonable borrowing fees to nonresidents, that the Legislature acted. Indeed, the Attorney General invited the Legislature to statutorily clarify the permissible scope of library regulation of usage by nonresidents. OAG, 1979-1980, No. 5739, p 875. The Legislature passed PA 1984, No. 432 (codified at MCL

¹⁴ Appellee finds a false “conflict” between sections 397.555(d) and 397.561, (Applee. Br. 22), because it fails to see the limited scope of section 397.561. Section 397.561 does not govern the relationship between cooperative libraries and nonresidents. That relationship is governed by section 397.561a. Hence, section 397.555(d)’s open door policy is effectuated by both provisions acting together. Appellee’s false conflict is simply another symptom of its trying to force all of the evidence into its preconceived interpretation of Section 9. Amici’s interpretation, by contrast, coherently fits sections 397.555(d), 397.561, and 397.561a into the broader original meaning of Section 9.

¹⁵ Appellee argues that “[i]f art 8, §9 required libraries to make all services available to nonresidents, the legislature would not have limited the availability of services to ‘resident[s] within the area’” in section 397.561. (Applee. Br. 21.) Appellee overlooks at least two obvious reasons for this limitation: First, section 397.561 provided that persons who would be, but for the cooperative plan, nonresidents, should receive library services *in accord with the cooperative plan* which would provide benefits—such as no individual borrowing fee—that nonresidents outside of the cooperative library’s service area would not receive. As explained in the text, the distinction between services provided to persons benefiting from the cooperative plan and nonresidents is made explicit in section 397.561a. Second, the Legislature did not limit services to residents, as is evidenced by section 397.561a.

397.561a) that authorized libraries to charge “nonresident borrowing fees.” The Attorney General opinions confirmed the Legislature’s belief that this amendment to the State Aid to Public Libraries Act was necessary because libraries were required by Section 9 to provide such services to nonresidents, and that they also possessed the constitutional authority to charge reasonable fees for such services.

The statutory language reflects this goal. Section 397.561a authorizes libraries to “charge” nonresident borrowing “fees.” MCL 367.561a. The text presumes that libraries are *required* to offer services to nonresidents because it does not have language authorizing libraries to serve nonresidents, such as “[a] library may [permit] nonresident borrowing”

The Court of Appeals’ contrary conclusion that the use of “may” in MCL 397.561a made not just the charging of a reasonable fee but the provision of services to nonresidents itself discretionary, fails to address the important context behind MCL 397.561a, and therefore misunderstands the Legislature’s intent. *Goldstone, supra* at 656. For that reason, the Court of Appeals’ bald assertion fails to adequately interpret MCL 397.561a. *See Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648, 651 (2004) (stating that effectuating the “intent of the Legislature” is the goal of statutory interpretation).

The Court of Appeals’ interpretation of MCL 397.561a fails for a second, related reason. “The words of a statute provide the most reliable evidence of intent.” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119, 123 (1999) (citation and internal quotations omitted). The Court of Appeals’ interpretation fails to make sense of section 397.561a’s text. The text states that a “library may charge nonresident borrowing fees” MCL 397.561a. The “may”

modifies “charge” and “fees,” not—as would make the Court of Appeals’ interpretation plausible—some other verb such as permit, as in “may [permit] nonresident borrowing [].”¹⁶

The point of section 397.561a is to authorize libraries to charge fees, not to authorize them to provide services to nonresidents. It would have been nonsensical for the Legislature, consistent with the Court of Appeals’ interpretation, to authorize libraries to provide services to nonresidents because there is no record of anyone disputing the authority of libraries to provide such services. There is, however, as related above, the context of MCL 397.561a, which shows that there was a dispute regarding the ability of libraries to *charge* for providing services to nonresidents. The Legislature wished to confirm the Attorney General’s resolution of that dispute, not reaffirm what no one questioned.

Amici’s explanation of the relationship between MCL 397.561 and 397.561a as covering residents and nonresidents respectively is bolstered by MCL 397.555(d) itself. In MCL 397.555(d) the Legislature required an open door policy to “the residents of the *state*.” *Id.* 397.555(d) (emphasis added). The Legislature could have, but did not, use more narrow terms in section 397.555(d) such as “the residents of the [cooperative library’s service area].” As it stands, section 397.555(d)’s text contradicts Appellee’s claims.

Relatedly, Appellee’s interpretation of Section 9 cannot explain why the Legislature included section 397.555(d) at all. Appellee argues that section 397.555(d)’s open door policy only refers to “the residents of the [cooperative library’s service] area.” (Applee. Br. 20, 22.) On that reading, however, section 395.555(d) is redundant with section 397.561. Amici’s interpretation avoids this redundancy and takes the Legislature at its word.

¹⁶ The Appellee similarly elides the distinction between discretion to charge a fee and discretion to “choose[] to loan books to nonresidents.” (Applee. Br. 24.) Section 397.561a grants discretion to charge a fee; it does not grant discretion to loan books to nonresidents.

2. Attorney general opinions also support Amici's interpretation

While the opinions of the Attorney General are not binding on this Court, *Frey v Dep't of Mgmt and Budget*, 429 Mich 315, 338; 414 NW2d 873, 883 (1987), they add weight to Amici's interpretation of Section 9's availability requirement. This is especially the case where, as here, all the other evidence of Section 9's original meaning supports Amici's interpretation. See 16 Am Jur 2d, Constitutional Law, § 89 (citations deleted) ("In line with the general rule as to the weight to be accorded contemporaneous and long-continued construction[s] of constitutional provisions, an administrative construction of a constitutional provision that generally has been accepted and acted upon over a long period of years, while not binding upon the courts, is entitled to great weight or at least serious consideration by the courts in determining the meaning of the provision, and they generally will not depart from such a construction unless it is clearly erroneous or unauthorized.").

There are two Attorney General opinions pertinent to this issue. The first was issued in 1980. OAG, 1979-1980, No. 5739, p 872. The Attorney General reviewed the text, historical background, and the Convention debates of Section 9 and concluded that Section 9's availability requirement mandated that public libraries give "all residents of the state" the "full use of the[ir] facilities."¹⁷ *Id.* at 875. This includes the "same right to borrow books that is offered to residents of the community in which the library is established." *Id.* at 874. The Attorney General's interpretation is consistent with the original meaning of Section 9, as described by Amici, and the Legislature's understanding of Section 9.

¹⁷ Appellee faults the Attorney General for failing to "acknowledge the debate over whether libraries will have to provide *free* services." (Applee. Br. 14 (emphasis added).) Appellee again attacks a straw person. The Attorney General answered the question of whether "residents of the state are entitled to use the facilities of any public library within the state." OAG, 1979-1980, No. 5739, p 872. He did not address the scope of library regulations and whether libraries had the authority to charge a fee for such services. This, as described in the text, the Attorney General did three years later. OAG, 1983-1984, No. 6188, p 195.

The second opinion reaffirmed the first's interpretation of Section 9's availability requirement, *see* OAG, 1983-1984, No. 6188, p 195 ("all residents of the state [are] entitled to the full use of public library facilities"), and went on to clarify that libraries may charge reasonable fees to nonresident users. *Id.* at 203. This too is consistent with Amici's interpretation of Section 9.

III. CONST 1963, ART 8, § 9, APPLIES TO ALL MICHIGAN PUBLIC LIBRARIES, NOT ONLY THOSE CREATED AFTER JANUARY 1, 1964

Appellee argues, for apparently the first time, that Section 9 does not apply to it because Section 9 went into effect in 1964, while Appellee "was established and created prior to the effective date."¹⁸ (Applee. Suppl. Br. 5.) This argument fails for a number of reasons, discussed below.

A. Evolution of Const 1963, art 8, § 9, Shows that it Applies to All Public Libraries

First, the background of Section 9 shows that it applies to libraries that existed prior to 1964. In the 1908 Constitution, the text stated that the "legislature shall provide by law for the establishment of at least 1 library. . . ." Cont 1908, art 11, § 14. This provision could plausibly be read as prospective because it directed the Legislature to "establish[]" public libraries. Establishing is an action that one does prospectively. One cannot establish something yesterday, for example. Establishing is creative of something new.

¹⁸ The Appellee's statement in its Supplemental Brief in Opposition to Appellant's Application for Leave to Appeal that it was "established and created prior to the effective date of art 8, §9" (Section 9's effective date was January 1, 1964), is contradicted by other representations it has made. For example, in its Counter-Statement of Facts on page 3 of Appellee's Brief in Opposition to Appellant's Application for Leave to Appeal, and in its Counter-Statement of Facts on page 1 of Appellee's Brief to the Court of Appeals, Appellee stated that it "is a free public library established by the voters of Bloomfield Township . . . in 1964." Appellee's statement in its Supplemental Brief in Opposition to Appellant's Application for Leave to Appeal also contradicts the Circuit Court's Statement of Facts where it found that "Defendant is a free public library established by Township voters in 1964." *Goldstone v Bloomfield Twp Pub Library*, No. 04-060611-CZ, slip op. at 1 (Circuit Ct. for County of Oakland May 13, 2005).

If the Appellee's previous representations are correct and it, in fact, was established in 1964, then its argument that Section 9 cannot "retroactively" apply to it, fails. Because it is unclear which representation is true, Amici will address Appellee's argument on the merits as well.

With the addition of “support” in Section 9, the language was applicable to existing libraries, *i.e.*, it applied “retroactively,” as Appellee is using the term. This is because supporting is something one does with already-existing things. So, contrary to Appellee’s claim, all public libraries which are *supported* by the Legislature—including those created prior to 1964—must be “available to all residents.” Even *if* Appellee was created prior to 1964, because it is supported by the Legislature, *see* (Applee. Suppl. Br. 11 (noting that it receives “state aid based on the number of residents of Bloomfield Township”)), Section 9 applies to it.

B. Appellee’s Argument Leads to Absurd Results

Appellee’s argument that Section 9 cannot be applied to libraries created prior to 1964 leads to absurd results, results that—given Appellee’s repeated appeals to public policy—should cause it concern. First, under Appellee’s interpretation of Section 9, the Legislature only has the obligation to “support” those libraries created after January 1, 1964. Therefore, the Legislature could refuse to support a large percentage of Michigan’s public libraries, including the Appellee itself.

Second, Appellee’s interpretation leads to the conclusion that the many libraries established by the Legislature prior to 1964 need not be “available” to nonresidents *or* residents. The Appellee argues that it “is not subject to art 8, §9.” (*Id.* 5-7.) Since Appellee is not subject to Section 9’s availability requirement, it is therefore free to exclude *both* nonresidents and residents. The reason for Appellee’s conclusion is equally applicable to a large percentage of other Michigan public libraries. The absurd result of Appellee’s argument is that no pre-1964 Michigan libraries need be available to *any* Michigan residents.

Third, and relatedly, if Appellee is correct, then neither it nor any other pre-1964 library is subject to Section 9’s availability requirement, whatever its scope. Therefore, the absurd

result is that they can exclude nonresidents from any and all library services, not just book borrowing.

Fourth, Appellee's interpretation leads to the absurd result that libraries established prior to 1964 would not receive money assessed for penal fines, an important source of library funding. The second sentence of Section 9 states: "All fines assessed and collected in the several counties, townships and cities for any breach of penal laws shall be exclusively applied to the support of *such public libraries*." Const 1963, art 8, § 9 (emphasis added). Section 9's second sentence refers back to the public libraries established or supported by the Legislature ("such public libraries"). If, as Appellee contends, only libraries established after January 1, 1964 are included in Section 9's first sentence, then only that same class of libraries is included in Section 9's second sentence. Under Appellee's reading, then, neither it nor any other libraries established prior to 1964, should receive penal fines, an important source of their funding.

Given Appellee's repeated public policy arguments, it is odd that Appellee advances an argument that leads to dramatically reduced public library availability. By contrast, Amici's interpretation of Section 9 avoids these absurd results and requires that all Michigan public libraries, regardless of the year of their establishment, make their services available to all Michigan residents.

C. No Evidence from the Constitutional Convention that Const 1963, art 8, § 9, Only Applied to Libraries Established After January 1, 1964

1. No evidence cited by Appellee to support its retroactivity argument

Not surprisingly, Appellee fails to cite *any* evidence from the Constitutional Convention showing that the delegates understood Section 9 to apply only prospectively. Instead, it cobbles together a couple of cases along with policy arguments. The reason for the absence of citation to

the Convention is simple: there is no evidence—statements, arguments, questions, colloquies—that the delegates understood Section 9 to operate only prospectively.

2. The delegates believed the Legislature would continue to aid establishment of new libraries and support existing libraries as the Legislature had done previously

As explained earlier in this Brief, Convention Delegates believed that Section 9 applied to all Michigan public libraries. In their view, the Legislature would continue to establish new libraries and support existing libraries as the Legislature had been doing for decades. The Committee on Education’s reasons for Proposal 31 stated that Proposal 31 would continue the Legislature’s role of supporting public libraries which it had been doing “since 1937.” *Official Record, supra* at 822; *see also id.* at 823 (Delegate Bentley) (“We have definitely inserted the word ‘support’ which implies a continuing responsibility on the part of the legislature.”).

Pre-1964 legislation provided the backdrop against which the delegates worked and of which they were aware. This legislation filled both roles of establishing and supporting public libraries. As early as 1877 the Legislature had helped to establish, through legislation, public libraries. City, Village and Township Libraries Act, 1877 PA 164, MCL 397.201 *et seq.*; *see also* County Libraries Act, 1917 PA 138, MCL 397.301 *et seq.*; Regional Libraries Act, 1931 PA 250, MCL 397.151 *et seq.* And beginning in 1938, the Legislature began financially supporting Michigan’s public libraries. *See* (Library of Michigan, *State Aid Guidelines for Michigan Libraries* (2000), p 18-19 (listing the annual appropriations by the Legislature).)

Contrary to Appellee’s argument, the Convention delegates saw themselves building on the Legislature’s previous legislation that both established and supported Michigan’s public libraries. They did not see Section 9 as demarcating a bright line between libraries based on the date they were established.

3. Appellee's interpretation would defeat the delegates' goal of effecting universal access to public libraries

The delegates' goal in amending the 1908 Constitution to create Section 9 was to extend library services to all Michigan residents, *see Official Record, supra* at 835 (Delegate Bentley) (stating that the Committee on Education's goal was to extend library services "to those residents of the state who are not now adequately provided with library services"), "through various media." *Id.* (Delegate Bentley); *see also id.* (Delegate Andrus) ("It [expanding access] would be done . . . by the surrounding communities paying a certain amount to your library, and all could use it, or they can charge . . . to the individuals who use it."). Appellee's interpretation of Section 9 would thwart that goal.

The delegates knew that it was unlikely the Legislature would establish a sufficient number of libraries given the poor results of the 1908 Constitution's mandate that the Legislature establish at least one library in each township and city. As Delegate Bentley told the delegates when he introduced Proposal 31, it "has never been adhered to as a matter of practice. Today, only 1 out of 15 townships has a library." *Id.* at 822; *see also id.* at 830 (Delegate Bentley) ("[B]ut since today only 1 out of 15 townships . . . does have a public library, we saw no reason to continue a constitutional provision which has not been enforced in any respect."). To overcome this obstacle, the delegates changed the primary constitutional means of making Michigan's public libraries available. Instead of mandating legislative establishment, the delegates opened existing libraries to Michigan residents who did not have access to a library in their municipality or township. *See id.* at 836 (Delegate Bentley) ("[A] person from any part of the state can come up to your library [in Bay City] and conform with your local regulations and rules, he can have that library and its services and its books made available to him.").

The crutch of the delegates' thinking was application of Section 9 to already-existing libraries. In the delegates' minds, therefore, access would not be adequately increased by a prospective-only requirement. A prospective-only requirement would depend on the same failed strategy of legislative establishment. For this reason, Appellee's interpretation of Section 9 as only applying to those libraries created after January 1, 1964, fails.

By 1964 the more heavily populated townships and municipalities had public libraries. One of the means chosen by the delegates to increase access to public libraries was to open these already-existing public libraries to the public, that is, to neighboring citizens who had no library access. Appellee's reading of Section 9 would thwart the means utilized by the delegates to increase access by making unavailable the very libraries targeted by the delegates. The delegates rejected as unworkable the 1908 Constitution's method of increasing access through establishing new libraries, and hence rejected Appellee's interpretation of Section 9.

D. Appellee's Retroactivity Argument Is Contrary to Other Arguments it Advances

This Court can see that Amici's interpretation of Section 9 is more faithful than Appellee's because Appellee's retroactivity argument is inconsistent with its other arguments, thereby making Appellee's overall interpretation of Section 9 incoherent. Appellee argues that it is "not subject to art 8, §9" because Section 9 should not "be applied retroactively." (Applee. Suppl. Br. 5-7.) Then, Appellee proffers a second argument: that Section 9 "is not self-executing" and hence "requires legislative action to implement its mandate." (*Id.* 7-13.) Appellee supports this argument by claiming that the Legislature executed Section 9 by establishing cooperative libraries through the State Aid to Public Libraries Act of 1977. (*Id.* 9-13.) Appellee admits that it "is a member of a cooperative." (*Id.* 11.)

Appellee's retroactivity and not self-executing arguments are inconsistent. The first argument is intended to show that Section 9 is inapplicable to it, while the second is supposed to

show that fleshing out the meaning of Section 9 is really the Legislature's, and not this Court's duty by giving the State Aid to Public Libraries Act as an example of the Legislature doing so. However, the State Aid to Public Libraries Act is applied to libraries, such as Appellee, that existed prior to 1964. In other words, it violates Appellee's admonition against retroactive application of Section 9.

IV. CONST 1963, ART 8, § 9'S AVAILABILITY REQUIREMENT IS SELF-EXECUTING

A. Const 1963, art 8, § 9's Mandate to the Legislature Does Not Apply to the Availability Requirement which Instead Relies on Action by the Public Libraries Themselves

Amici agree with Appellee to the extent that legislative action is required for the Legislature to "establish[] and support" public libraries. However, Appellee's broader claim that even Section 9's availability clause *requires* legislative action fails. (*Id.* 7-8.) Textually, "shall provide by law for" modifies only "establishment and support," not "which shall be available." It makes sense grammatically to tie the Legislature's duty to "provide by law for" with "establishment and support" of public libraries, but it does not make sense to tie it with "which shall be available." In order to make Appellee's interpretation of Section 9 plausible, the text would have to include "[*and* for their availability] to all residents . . ." after "public libraries." The textual contortions one must go through to support Appellee's interpretation is perhaps the reason why Appellee neglected to base its argument on Section 9's text.

Relatedly, the clause, "which shall be available to all residents of the state," is modified by "under regulations adopted by the governing bodies [of public libraries]." The availability clause is not modified by "the legislature shall provide by law for." Textually, Section 9's availability requirement requires public libraries themselves to adopt regulations.

This interpretation is in keeping with the delegates' understanding that the 1908 Constitution's reliance on legislative action had failed to produce results, and their consequent move toward mandating that existing libraries open themselves to all of Michigan's residents. Amici discuss this further, below.

B. Const 1963, art 8, § 9's Availability Requirement is a Determinate Order to Public Libraries and Hence Does Not Require Legislative Action

Appellee, relying on Justice Cooley, argues that Section 9 is "not self-executing because it merely states the principles" while "leav[ing] it to the Legislature to enact legislation to implement the mandate." (*Id.* 8.) Appellee's argument falls short because Section 9's availability requirement is not a vague, generalized principle that requires legislative implementation. Instead, "available" has a determinate original meaning, and it is used repeatedly elsewhere in the Constitution.

First, Justice Cooley's definition of self-executing is inapplicable because "available" is sufficiently determinate. In his treatise, *Constitutional Limitations*, Justice Cooley stated that a constitutional provision is "self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Cooley, *Constitutional Limitations* (5th ed), p 100. By contrast, a constitutional provision is not self-executing "when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Id.*

Requiring that Michigan's public libraries "be available to all residents of the state" falls into the former category. Availability is not an abstract principle like equal protection or cruel and unusual. Instead, it is a concrete command to libraries that they must make their services available to nonresidents as well as residents.

In fact, an example of a self-executing provision used by Justice Cooley employs terms similar to “available.” Justice Cooley stated that the Fifteenth Amendment’s language, the right to vote “shall not be denied or abridged,” was a self-executing constitutional provision. *Id.* at 99. The terms “denied” and “abridged” are similar in generality to “available.” In addition, all the terms connote access or the lack thereof to a particular object. If “denied” and “abridged” are self-executing, then so is Section 9’s availability requirement.

States may have good reasons to enact constitutional provisions that are not self-executing. They may want to give the people’s legislative representatives discretion within broad bounds to act appropriately under unforeseen circumstances. This rationale does not hold, however, for local public libraries. The Legislature represents all the people of Michigan. A public library, at best, represents a small area. The constituents of a public library may want to keep out nonresidents and they will have the political will to do so because nonresidents would have no political clout in the public library’s governing body. By contrast, the Legislature has constituents from all parts of the state. As a result, a state would not want to leave a local public library with the discretion whether to implement a constitutional command to aid the very people—nonresidents—who are excluded from the local library’s elective constituency. The text, “under regulations adopted by the governing bodies [of the public libraries],” shows that Section 9’s availability requirement is self-executing because the delegates would not want to give libraries—the bodies referenced in the text—the discretion to exclude nonresidents.

Even if Section 9’s availability requirement was not self-executing, its text indicates that it would be local libraries and not the Legislature who have the discretion to implement the availability requirement. Public libraries are the state entities authorized by Section 9 to create regulations to comply with the availability requirement, not the Legislature. The conclusion

must be that the Legislature has no discretion to execute Section 9’s availability requirement and that local public libraries can protect their financial and collection integrity with reasonable regulations.

Second, the evidence adduced above, *see supra* Parts I and II, shows that “available” has a determinate textual and original meaning. The delegates had the goal of using existing public libraries to ensure that all Michigan residents had access to public libraries. One of the means used by the delegates was Section 9’s constitutional mandate that public libraries make themselves available to nonresidents in the same way they were available to residents. Of course, to accommodate the different circumstances that libraries face—financial, geographic, time constraints, collection related issues—the delegates wisely chose to give libraries the discretion to create and maintain rules regarding usage of services by residents and nonresidents. But this discretion does not make “available” indeterminate and require legislative action.

Third, “available” is used repeatedly elsewhere in Constitution. The term “available” appears at: Const 1963, art 4, § 6 (stating that after the federal census “is available” the secretary of state shall act); *Id.* art 4, § 17 (mandating that legislative committee votes “shall be available for public inspection”); *Id.* art 9, § 6 (“property taxes at the highest rate available in the county”); *Id.* art 9, § 35 (“Not less than 25 percent of the total amounts made available for expenditure”); *Id.* (“not more than 25 percent of the total amounts made available for expenditure”); *Id.* art 9, § 35a (“Money available for expenditure from the endowment fund”); *Id.* (“only the interest and earnings of the endowment fund in excess of the amount necessary to maintain the endowment fund’s accumulated principle limit may be made available for expenditure”). This repeated use shows that the delegates who drafted Section 9 and used the term “available” did not believe that

its meaning was unclear. Instead, it shows that “available” was a term the delegates believed conveyed sufficient guidance to governmental actors to be used repeatedly.¹⁹

The frequent use of “available” by the Constitution also gives the term more concrete meaning than might it otherwise have. Through a process of looking at the use of “available” elsewhere in the Constitution, one can come to a clearer understanding of its constitutional meaning in Section 9. *See* Amar, *Intratextualism*, 112 Harv L Rev 747 (1999) (elaborating this process). Amici used this process in Parts I and II to elucidate the meaning of Section 9.

Lastly, this Court must keep in mind that the text at issue is found in the Michigan Constitution, not a detailed statutory or regulatory scheme. Chief Justice Marshall’s famous admonition, “we must never forget that it is a constitution we are expounding,” *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407; 4 L Ed 579 (1819), shows that one should not expect a great level of detail in a constitution because it is the people’s document and they must therefore be able to understand it. *Id.* at 406-07.

This same concern animated the delegates in the Michigan Constitutional Convention. For instance, when faced with a proposed amendment to Proposal 31, Delegate Andrus acceded to the amendment but advised the delegates that they needed to keep in mind the nature of the document they were creating: “It just makes the constitution longer and we [the Committee on Education] were trying to make it as brief as we could.” *Official Record, supra* at 836. Delegate Faxon agreed, warning that some of the delegates were seeking a level of detail inappropriate to a constitution: “I don’t understand why there is such a need to get into such specificity with regard to the particular section . . . we are demanding a detail, legislative detail.” *Id.* at 837.

¹⁹ Along these same lines, “available” is regularly used in legislation. A search for the term “available” in the Westlaw database “Michigan Compiled Laws Unannotated” yielded almost 3500 entries.

The Appellee's argument hinges on an unrealistic expectation of detail from constitutional text. Therefore, this Court should reject Appellee's argument that Section 9 requires legislative action because it is too indeterminate.

C. The Delegates Understood that Const 1963, art 8, § 9's Availability Requirement was Self-executing

The evidence from the Convention shows that the delegates understood that Section 9's availability requirement was self-executing and did not require legislative action to implement. The first piece of evidence is that the delegates extensively debated the scope of "available." Delegate Leibrand offered an amendment to avoid what he saw as the potential for free-riders to use Proposal 31's language to obtain free library services. *Id.* at 834. His amendment set off a long discussion on the scope of "available." *Id.* at 834-37. This entire debate would have been unnecessary if Section 9's availability requirement was not self-executing and the Legislature would define the scope of available. If the delegates meant to "leave[] it to the Legislature to enact legislation to implement the mandate," as Appellee suggests, (Applee. Suppl. Br. 8), then the delegates wasted a substantial amount of time.

Within the delegates' debate on the scope of Section 9's availability requirement, they focused on what "reasonable" regulations libraries—not the Legislature—could impose on nonresident book borrowing. The main focus of the delegate's discussion was on the fiscal impact and the impact on the integrity of libraries' collections. Delegate Leibrand related his concern that Section 9's mandate of availability would subject Bay City's public library to nonresidents—"all residents of the state," in his words—seeking free services. *Official Record, supra* at 834. Delegate Dehnke expressed his concern that Section 9's availability clause could be construed in such a way as to threaten the integrity of library collections. *Id.* at 836. In response to these, and similar concerns expressed by other delegates, the members of the

Committee on Education, especially Delegate Bentley who chaired the Committee, reiterated that Section 9 permitted libraries to create “regulations” “for the use and control of [their] books.” *Id.*; *see also id.* at 835 (Delegate Andrus) (“it doesn’t say free”); *id.* at 836 (Delegate Bentley) (“rules which may be adopted by local libraries for use in the control of their books”).

The delegates’ questions to the Committee and the Committee members’ responses would have been irrational unless Section 9’s availability requirement was self-executing. If Section 9’s availability requirement simply authorized the Legislature to create legislation, then the delegates would have known that their questions and answers to their questions would all point to the Legislature’s discretion. But that is not what Delegates Bentley and Andrus stated. They took the delegates’ questions at face value and responded with answers that affirmed the authority of individual public libraries to enact rules to protect their financial and collection integrity.

Furthermore, the delegates repeatedly affirmed their understanding that Section 9 encouraged a variety of means to effect wide access for Michigan residents, an understanding in conflict with Appellee’s argument that the Legislature had discretion to implement Section 9. Delegate Bentley introduced Proposal 31 by stating that one of the ways the Committee on Education envisioned it expanding access to libraries was through “cooperation, consolidation, branches and bookmobiles.” *Id.* at 822; *see also id.* at 835 (Delegate Bentley) (stating that Proposal 31 encouraged the use of “various media” to extend “library services throughout the state to all its residents”).

These representations by Delegate Bentley are inexplicable unless the availability requirement is self-executing. Many of the means Delegate Bentley noted are actions that individual libraries, not the Legislature, would take. The Legislature would not, for example,

send out a bookmobile. More importantly, even when directly asked by Delegate Higgs whether the Legislature should determine the scope of availability, *id.* at 835, Delegate Bentley did not answer “yes,” as the Appellee’s interpretation of Section 9 would suggest. Instead, he responded that although “it is possible to cover a great many things by statute,” the Committee wanted to encourage “the extension of library services throughout the state to all its residents through various media.” *Id.*

The availability requirement was not, in the delegates’ eyes, indeterminate. Indeed, they stated just the opposite. In the delegates’ debate over the scope of Section 9’s availability requirement, Delegate Dehnke stated that “this language . . . is broad and definite and specific.” *Id.* at 836; *see also id.* (Delegate Kuhn) (“I think the committee proposal is sound, reasonable, and well refined.”); *id.* (Delegate Bentley) (“I think the intent is clear—crystal clear beyond any doubt.”). It is apparent, in light of the above, that Appellee did not support its non-self-executing argument with reference to Section 9’s original meaning because the evidence from the Convention overwhelmingly refutes its claims.

D. Appellee’s Argument that Const 1963, art 8, § 9’s Availability Requirement is not Self-Executing Paints the Legislature in a Bad Light

As a central part of its argument that Section 9 is not self-executing, Appellee points to the State Aid to Public Libraries Act of 1977. (Applee. Suppl. Br. 9-13.) Appellee claims that Section 9 requires legislative action because of the term “establish,” and that the Legislature “adopted legislation to implement art 8, §9” through the Act. (*Id.* 9.)

Appellee’s argument paints the Legislature in a bad light, as having neglected its constitutional duty for approximately thirteen years. Section 9 became effective in 1964. On Appellee’s reading, for thirteen years Section 9 was a dead letter. Appellee’s argument rests on the premise that the Legislature failed to fulfill its constitutional duty to execute Section 9 until

1977, when it enacted the Act. *See* (Applee. Br. 20 (“The creation of library cooperatives fulfills the mandate of art 8, §9.”).) Thus, Appellee’s non-self-executing interpretation of Section 9 has driven it to discredit the Legislature for its thirteen years of purported inaction.

By contrast, Amici’s interpretation of the Legislature’s role under Section 9 gives the Legislature its due regard. Amici argue that Section 9’s availability requirement is self-executing. As a result, the Legislature’s role is to establish and support Michigan public libraries. This the Legislature has done through legislation from at least 1877 to today. Such legislation provided the legal framework for libraries to operate, established libraries, and provided financial and other assistance. Indeed, in 1965 the Legislature passed legislation that provided additional funding to libraries. Since, under Amici’s interpretation, Legislative action is not necessary to execute Section 9’s availability requirement, the lack of the Legislature establishing a library until 1977 does not presume that the Legislature failed in its duty, as does Appellee’s construction.

E. The Legislature Retains a Role in Making Michigan’s Public Libraries Available

Amici’s interpretation of Section 9, of course, retains a substantial role for the Legislature in implementing its requirements. As the delegates indicated, they believed the Legislature would “provide by law” for many things, including financial support, *Official Record, supra* at 822 (Delegate Bentley), organizing the distribution of penal fines, *id.* at 823 (Delegate Bentley), and creation of the legal background for cooperation among libraries. *Id.* at 822 (Delegate Bentley).

V. RESPONSE TO APPELLEE’S REPEATED—MISPLACED—PUBLIC POLICY ARGUMENTS

A. Appellee Inappropriately Uses Policy Arguments in its Discussion of Const 1963, art 8, § 9

As this Court has repeatedly admonished, “[t]he primary objective in interpreting a constitutional provision is to determine the text’s original meaning.” *County of Wayne, supra* at 468. This Court’s power extends only to drawing out the meaning of the Constitution and not in “deciding public policy.” *National Wildlife Fed’n v Cleveland Cliffs Iron Co*, 471 Mich 608, 615; 684 NW2d 800, 807 (2004); *see also School Dist of City of Pontiac v Pontiac*, 262 Mich 338, 353; 247 NW2d 474, 479 (1933) (“The constitutional duty of courts is to interpret and apply the law, not to enact laws.”).

Despite the constitutionally limited role of this Court as interpreter of the Constitution, Appellee peppers its briefs to this Court with public policy claims.²⁰ *See, e.g.*, (Applee. Br. 2, 17.) Appellee, for instance, represents to this Court: “*If* the state constitution is interpreted to require every public library to offer full privileges to nonresidents . . . the existing system of contractual arrangements . . . will be eliminated.” (*Id.* 2 (emphasis added).) These policy arguments present a host of constitutional problems for a court engaged in constitutional interpretation. *See Corrigan, Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 Tex Rev L & Pol 261, 262-66 (2004) (noting that nonoriginalist arguments overreach a court’s role in democratic society and create unpredictability).

B. Appellee’s Interpretation of Const 1963, art 8, § 9, Would Limit Access to Public Libraries, While Amici’s Would Expand Access

Amici will briefly rebut Appellee’s policy assertions. Appellee makes the alarmist claim that if this Court rules in accord with Section 9’s original meaning, “the existing system of

²⁰ Appellee also resorts to name-calling. *See* (Applee. Br. 1 (calling Appellant’s purported “crusade” “selfish”).) Appellee does not explain how ad hominem attacks advance its constitutional argument.

contractual arrangements . . . will be eliminated.” (Applee. Br. 2); *see also* (*id.* 17 (arguing similarly that libraries and communities “would never agree to a contract”).) Not only is Appellee’s dire prediction false, it is exactly backward: following Section 9’s original meaning will likely increase library services contracts.

Libraries and townships and municipalities would continue to enter into library services contracts under Amici’s interpretation of Section 9 for many reasons. First, there is the simple consideration that people do not want the hassle of individually going through the process of procuring nonresident borrowing privileges. By a city contracting with a library, its residents can avoid the process. Second, and relatedly, it is more efficient for a city and library to contract for library services than for each of a city’s residents to go through an individualized process. Cities will contract to obtain the efficiencies it will bring. Third, a city may have low-income residents who either would not have the means or would perceive themselves as not having the means to pay an individual nonresident fee for library services. The city can obtain for such residents library services they otherwise would not enjoy.

Indeed, it is *more* likely that libraries, townships, and municipalities will enter library services contracts under the original meaning. Under a constitutional regime as envisioned by Appellee, where city residents like those of Bloomfield Hills have no or greatly lessened access to a public library absent a library services contract—because they cannot procure library services individually—libraries have inordinate leverage over cities. Libraries will offer to enter into library services contracts with steep payment provisions on a take-it-or-leave-it basis. This disparity in bargaining power obviously leads to fewer library services contracts.

By contrast, under the original meaning of Section 9, libraries will have less leverage over cities and will be constrained to charge only a reasonable amount. Libraries and cities will

know that, even though a city and its residents would not prefer to resort to individual procurement of library services (for the reasons given above) they have that option. As a result, adhering to Section 9's original meaning will remove the imbalance of bargaining power that presently exists and will likely result in greater contracting for library services.

CONCLUSION AND RELIEF REQUESTED

This is really not a difficult case. A reasonable person would interpret “which shall be available to all residents of the state” to mean what it says: that any Michigan resident, regardless of where he or she resides, must have access to the services of any Michigan public library. As Delegate Bentley stated, when explaining the meaning of Section 9’s availability requirement: “the intent of the committee on education, Mr. Chairman, is just exactly what those words imply.” *Official Record, supra* at 823. The text, history, context, and subsequent interpretations by the executive and legislative branches all confirm that Section 9 requires Michigan public libraries to offer the same services to nonresidents as they do to residents, subject, of course, to preserving the integrity of the libraries’ finances and collections.

Amici ask this Court to grant Plaintiff-Appellant’s Application for Leave to Appeal and/or reverse the Court of Appeals by ruling that Section 9 requires Michigan public libraries to open their services—including book borrowing—to all Michigan residents, subject to reasonable regulations, such as a reasonable borrowing fee to cover actual costs, to protect the fiscal and collection integrity of the libraries.

Respectfully submitted,

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